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(2)

No: 95-1448

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARIO LUDMER,

Respondent,

vs.

MAURICE A. NERNBERG, JR.,

Petitioner.

REPLY BRIEF PURSUANT TO RULE 15 A

Maurice A. Nernberg
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ASSOCIATES
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REPLY BRIEF PURSUANT TO RULE 15 A

This response is pursuant to Rule 15 A.

The statements contained in the Respondent's Brief are simply not true.

The Wrongful Use statute became effective on February 19, 1981. As may be noted by the Docket Entries Appendix, p. 10a, the only activity that took place after the effective date was the granting of Defendant's motion for summary judgment (which had been filed prior to the effective date). The only activity of the Plaintiff following the effective date was the appeal from the summary judgment.

An appeal cannot be the basis of a Wrongful Use action, Rosen v. American Bank of Rolla, 42 Pa.Super.376, 627 A2d. 190 (1993).

Also, as may be evidenced by the complaint, attached as Appendix, p. 1a, there is no distinction made between activities that took place before the effective date of the statute and thereafter. The record in the case evidences that the trial court made no such distinction. Neither did the appellate courts, either in the first appeal which resulted in reinstating the action against the Petitioner, nor in the second, after the judgment was rendered.

CONCLUSION

In conclusion, the Petitioner respectfully requests this Honorable Court support Petitioner's Reply Brief and grant the Petition for Writ of Certiorari, thereby denying the Brief of Respondent, Mario Ludmer, in Opposition to Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: _____

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Counsel for Petitioner

APPENDIX

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARIO LUDMER,	CIVIL DIVISION
Plaintiff,	No. GD84-11881
vs.	Issue Number:
MAURICE A. NERNBERG, JR.,	Code: 009
Defendant.	CIVIL ACTION

Filed on behalf of Plaintiff, MARIO LUDMER

Counsel on Record on behalf of this Party:
Seymour A. Sikov, Esquire
Pa. I.D. #01002
Sikov and Love, P.A.
Firm #015
1400 Lawyers Building
Pittsburgh, PA 15219
(412) 261-4202

To the within Plaintiff
You are hereby notified to plead to the enclosed within twenty (20) days for service hereof or a default judgment may be entered against you.
SIKOV AND LOVE, P.A.
By: /s/ Seymour A. Sikov
Attorney for Defendant

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by the attorney filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU SHOULD NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERRAL SERVICE
(NAME) ALLEGHENY COUNTY BAR ASSOCIATION
920 CITY-COUNTY BUILDING
(ADDRESS) PITTSBURGH, PA 15219

(TELEPHONE) (412) 261-0518

SIKOV & LOVE

BY /s/Seymour A. Sikov

COMPLAINT - CIVIL ACTION

Count I

1. The plaintiff is a medical doctor duly authorized and licensed to practice medicine within the Commonwealth of Pennsylvania maintaining his offices in the Passavant Professional Building located in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania (hereinafter referred to as Ludmer).

2. The defendant is an adult individual and is an attorney admitted to practice before Courts of the Commonwealth of Pennsylvania and maintaining offices at 301 Smithfield Street in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania (hereinafter referred to as Nernberg).

3. At all times material hereto, the defendant was acting by and through his duly authorized agents, servants and/or employees who were acting within the scope of their authority and in the course of their employment.

4. On or about March 5, 1979, the defendant, an attorney, commenced a lawsuit against the plaintiff by filing a Praecipe for Writ of Summons in Trespass in the Court of Common Pleas of Allegheny County, Pennsylvania, at G.D. 79-6085, the pleadings, depositions, briefs, court orders and opinions therein being incorporated by reference as if more fully set forth as length herein.

5. On or about July 12, 1979, after

the depositions of the plaintiff, the defendant and one Margaret O'Toole had been taken, the defendant filed a Complaint in Assumpsit in the aforementioned action at G.D. 79-6085, a copy of said Complaint being attached hereto and marked as Exhibit "1".

6. Count I of the aforementioned Complaint filed as G.D. 79-6085 alleged, inter-alia, that Ludmer failed to cooperate with Nernberg in the preparation of a lawsuit in which Nernberg represented one Margaret O'Toole and, as alleged result thereof, the case was settled for less than it was worth and the size of Nernberg's contingent fee consequently reduced.

7. Count II of the aforementioned Complaint filed at G.D. 79-6085 alleged that Ludmer interfered with the contractual relationship which existed between Nernberg and his client, O'Toole.

8. After discovery was taken in the aforementioned matter as G.D. 79-6085, Ludmer filed a Motion for Summary Judgment, a copy of which is attached hereto and marked as Exhibit "2".

9. On or about April 20, 1981, after submission of briefs on Ludmer's Motion for Summary Judgment in the aforementioned matter at No. G.D. 79-6085 and after argument before the Court en Banc, Judges Raymond L. Scheib and Richard G. Zeleznik of the Court of Common Pleas of Allegheny County presiding, the Court granted Ludmer's Motion for Summary Judgment.

10. On or about June 5, 1981, Nernberg appealed the granting of Summary Judgment in the aforementioned matter at G.D. 79-6085 to the Superior Court,

docketed at No. 632 Pittsburgh, 1981, copies of all pleadings, briefs, opinions and orders therein being incorporated by reference as if more fully set forth herein.

11. Thereafter, briefs were submitted by both parties and argument before the Superior Court was held on October 12, 1982.

12. On or about May 6, 1983, the Superior Court issued an Opinion and Order affirming the granting of Ludmer's Motion for Summary Judgment in the lower Court, a copy of the Order and Opinion of the Superior Court being attached hereto, marked as Exhibit "3".

13. From the Opinion and Order entered by the Superior Court in the aforementioned matter at No. 632 Pittsburgh, 1981, Nernberg sought allocatur to the Supreme Court of the Commonwealth of Pennsylvania by filing a Petition for Allowance of Appeal on June 3, 1983.

14. On or about September 14, 1983, the Supreme Court denied the Petition for Allocatur filed by Nernberg, a copy of the letter of the Supreme Court Prothonotary documenting said denial, being attached hereto and marked as Exhibit "4".

15. As a result of the Supreme Court's denial of allocatur of September 14, 1983, the aforementioned action filed by Nernberg against Ludmer was terminated in favor of Ludmer.

16. As a result of the actions of Nernberg in bringing and prosecuting the aforementioned action against Ludmer, Ludmer sustained certain damages and injuries and suffered emotional distress.

17. All of the resultant losses, damages, and injuries sustained by the plaintiff were a direct and proximate result of the gross negligence and outrageous and improper conduct of the defendant in wrongfully and maliciously using civil proceedings against the plaintiff generally and in the following particulars:

a. By commencing and prosecuting the aforementioned action at No. G.D. 79-6085 in a grossly negligent manner and without probable cause; and/or

b. By commencing and prosecuting the aforementioned matter at G.D. 79-6085 primarily for a purpose other than that of securing the proper discovery, joinder of parties and adjudication of that matter; and/or

c. By commencing and prosecution the aforementioned matter at G.D. 79-6085 solely for the purposes of harassing the plaintiff herein; and/or

d. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the purposes of defaming the plaintiff herein; and/or

e. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the

reasons of causing the plaintiff herein undue burden, hardship and expense; and/or

f. By commencing and prosecuting the aforementioned action at G.D. 79-6085 solely for the purposes of maliciously injuring the plaintiff herein; and/or

g. By commencing and prosecuting the aforementioned action at G.D. 79-6085 without properly believing that under the facts set forth therein, the claim would be valid under the existing or developing law; and/or

h. By commencing and prosecuting the aforementioned action at G.D. 79-6085 without properly believing the claim to be valid under the existing law after full disclosure of all relevant facts within his knowledge and information; and/or

i. By commencing and prosecuting the aforementioned action at G.D. 79-6085, as an attorney of record, when he knew that the procurement, initiation or continuation of the matter was intended merely to harass or maliciously injure the plaintiff herein; and/or

j. By commencing and prosecuting the aforementioned action at

G.D. 79-6085 in a grossly negligent manner and without probable cause; and/or

k. By otherwise acting negligently and without due care and regard for the rights and person of the plaintiff.

18. As a direct and proximate result of the gross negligence and outrageous and improper conduct of the defendant, the plaintiff suffered damages to his reputation.

19. As a direct and proximate result of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff incurred expenses in the nature of court costs and counsel fees in defending himself against the claims set forth in the aforementioned action commenced at No. G.D. 79-6085.

20. As a direct and proximate result of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff suffered pecuniary loss by being absent from his medical practice in order to meet with his attorney, appear for depositions and otherwise prepare the aforementioned action commenced at No. G.D. 79-6085 for argument and disposition.

21. As a direct and proximate result of the grossly negligent and outrageous, and improper conduct of the defendant, the plaintiff suffered emotional distress caused by the commencement of the action by Nernberg against him and by the necessity of defending himself in the proceedings commenced No. G.D. 79-6085.

22. As a direct and proximate result

of the grossly negligent and outrageous and improper conduct of the defendant, the plaintiff was greatly inconvenienced.

WHEREFORE, the Plaintiff claims of the defendant damages in excess of TWENTY THOUSAND ($20,000) DOLLARS.

COUNT II

23. The allegations set forth in paragraph one (1) through twenty-two (22) inclusive are incorporated by reference as if more fully set forth at length herein.

24. The actions of the defendant in commencing and prosecuting the aforementioned action at No. G.D. 79-6085 were unreasonable, outrageous, grossly careless and in capricious disregard of the rights of the plaintiff inasmuch as the defendant, an attorney, knew or should have known that probable cause for commencement and prosecution of said action did not exist and, as a consequence thereof, damages to the plaintiff herein were substantially certain to follow.

WHEREFORE, the plaintiff requests punitive damages against the defendant in an amount in excess of TWENTY THOUSAND ($20,000) DOLLARS.

Respectfully submitted,

SIKOV AND LOVE, P.A.

By /s/Seymour A. Sikov
Seymour A. Sikov

JURY TRIAL DEMANDED

OFFICIAL DOCKET ENTRIES

COMMONWEALTH OF PENNSYLVANIA }
}SS.
ALLEGHENY COUNTY }

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the Docket Entries at No. GD 79-6085

DOCKET ENTRY

MAURICE A. NERNBERG, JR.	March 9, 1979 Summons in Trespass
VS.	Returnable April 8, 1979
MARIO LUDMER, M.D.	March 22, 1979 Praecipe for rule to file a complaint filed. March 27, 1979 Writ returned served deft. 3-22-79 filed March 28, 1979 Rule returned acceptance of service 3-28-79 filed April 16, 1979 Verification of M.A. Nernberg filed. May 4,

] 1979 Order of
] April 30, 1979
] permitting
] deposition of
] deft. to be
] limited to
] allegations of
] paragraph 2 of
] pltf's motion.
] pltf to file
] complaint
] within 10 days
] of deft.

I, JOHN P. JOYCE, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the Docket Entries wherein

MAURICE A. NERNBERG, JR., Plaintiff

and

MARIO LUDMER, M.D. Defendant; as the remains of the record before the said Court, at No. GD 79-6085

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, the 1st day of July 1981

/s/ John P. Joyce
Prothonotary

/s/ Anna Bodnar
Deputy

deposition-Wettick, J. Eodie opinion filed. May 7, 1979 Notice of deposition of deft. & certificate of mailing 5-4-79 filed. May 10, 1979 Notice to take deposition of pltf. filed. May 14, 1979, Order of May 11, 1979 for taking of depositions of deft. and pltf. as indicated - Wettick, J. June 7, 1979 Response to request filed. June 27, 1979 notice to take deposition files July 12, 1979 Complaint filed July 2, 1979 on June 29, 1979 Plaintiff shall bring with him the documents to said deposition but may raise attorney/client privilege at said deposition-Wettick, J. July 26, 1979 Deft's Preliminary Objections filed. Sept. 16, 1980 Order; Prelim. Objects. of deft. are dismissed, deft, has 20 days to file responsive pleadings- Zappala, J. Sept. 16, 1980 Notice of deposition of S. Sikov filed Sept. 19, 1980 Order of 9-17-80; Motion for extension denied - Papadakos, J. Sept. 22, 1980 Deft's answer & new matter to complaint filed. Sept. 29, 1980 Pltf. & Deft's Cert of Readiness filed (2) Oct. 3, 1980 Notice of deposition of Mario Ludmer, M.D. filed eodie Plff's answer to new matter filed Oct. 3, 1980 Order; Interrogs to be furnished Mr. Rika in leave of any depositions, see Order filed-Wettick, J. Oct. 9, 1980 Cert. of Service of interrogs. 10-9-80 filed. Oct 17, 1980 Ordered that the taking of the second deposition of the defendant in within captioned matter shall be rescheduled for Nov.,1980.- Wettick, J. eodie Countermotion for Sanctions filed Nov. 7, 1980- Deft's Notice of Deposition filed. Nov. 12, 1980 Issue # 113713 Nov. 12, 1980

Interrogs of pltf to S. Sikov & answers filed. December 12, 1980 Motion of deft for stay of proceedings filed eodie deft's motion for summary judgment filed eodie deft's Brief in support of motion for summary judgment filed. Dec.15, 1980 Order of 12-12-80 filed; Dr. Ludmer to appear for deposition on 12-23-80 - Wettick, J. Dec. 16, 1980 Depositions of Maurice A. Nernberg, Jr., Margaret O'Toole & Mario Ludmer, M.D. (3) filed. Jan. 22, 1981 Notice of hearing of Motion to Stay filed. Feb. 17, 1981 Answers to Deposition Questions filed on Behalf of Defts. and Affidavit filed. Feb.18, 1981 Order of 2-11-81 filed; Deft. shall within 5 days/of receipt of this order file full answers by affidavit to question specified - Wettick, J. April 20, 1981 Order; Deft's Motion for Summary Judgment is granted-Scheib, J. May 29, 1981 Judg. entered in favor of deft. as per court order, Notice mailed 5-29-81. June 5, 1981 Notice of appeal of Pltff., Maurice A. Nernberg, Jr. to Superior Court # _____ & proof of service filed.